No. 20591

# United States
# COURT OF APPEALS
## for the Ninth Circuit

REDERI A/B SOYA, as owners of the Swedish Motor Vessel OTELLO,

*Appellant,*

v.

The SS. GRAND GRACE, her Engines, etc., and her Owners, GRACE NAVIGATION CORPORATION,

and

The MV JANE STOVE, her Engines, etc., and her Owners, LORENTZENS SKIBS A/S,

*Appellees.*

## BRIEF OF THE "JANE STOVE" APPELLEE LORENTZENS SKIBS A/S

*Upon Appeal from the United States District Court, for the District of Oregon*

HONORABLE JOHN F. KILKENNY, District Judge

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-66

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### STATEMENT

Appellant's "Statement" should more appropately have been included in the "Argument" section of appellant's brief. It consists, for the most part, of a recita-

tion of appellant's contentions—contentions which have been controverted throughout by both appellees and which were expressly rejected by the trial court as being based on "shadowy, illusory and in most instances non-existent" evidence (Mem. Dec., R. 74).

At the outset, the relative positions of the involved vessels prior to the collision is not correctly stated in appellant's brief. The location of the ANTINOUS is obviously most accurately fixed by reference to her own anchor bearings. According to these, she was anchored in the main ship channel, right on or a little bit north of the center line of the Astoria Range (R. 1616, 1629, 1632, 1704). This conforms closely with the testimony of Pilot Quinn, who also placed the ANTINOUS slightly north of the Astoria Range (R. 289, Ex. 22A, 22B).

Contrary to appellant's statement that the OTELLO was anchored only 500 feet from the ANTINOUS, the most reliable evidence (the ANTINOUS' radar) established that the two vessels at no time were ever closer to each other than .2 of a nautical mile, or approximately 1200 feet (R. 1613, 1640, 1670). It is thus seen that the OTELLO had much more room in which to maneuver than appellant's brief would indicate.

Appellant correctly states that at about 2:30 p.m., the OTELLO commenced dragging anchor and that, some time later (established by the OTELLO's Chief Mate and carpenter to be well after 3:00 p.m.—R. 414, 584), the order was given to heave in the anchor. There is no dispute that the OTELLO's anchor chain caught across her bow and the bow then swung to the right,

leaving her broadside to the wind and heading in a generally northerly direction. From this point, however, appellant's elaborate explanation of the OTELLO's efforts to regain control of her movements, and why they were unsuccessful, is completely at odds with the credible evidence presented.

That the OTELLO did continue to drag and ultimately was set down onto the GRAND GRACE is established. The rest of appellant's "facts"—and specifically that portion which characterizes the actions of the JANE STOVE as negligent—is pure argument and will be treated later in this brief.

## ARGUMENT

### Summary

The trial court's specific findings that the JANE STOVE was not at fault and that the collision was caused solely by the "flagrant and major" fault of the OTELLO are supported by substantial evidence and are not clearly erroneous, and should therefore not be set aside.

The trial judge did make independent findings of fact, as reflected in his Memorandum Decision (R. 74). The fact that the formal findings of fact thereafter entered were prepared with the assistance of counsel does not make them any the less findings of the court.

Affirmative findings of negligence and the absence thereof are findings of fact within the "clearly erroneous" rule and are not mere conclusions of law.

## I

### The "Clearly Erroneous" Rule Applies.

*McAllister* v. *United States* (1954) 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20,

established that federal appellate courts have no greater scope of review in admiralty than under Rule 52(a) of the Federal Rules of Civil Procedure and that the findings of fact of a trial court sitting in admiralty may not be set aside unless they are clearly erroneous.

Since that decision, this court has consistently followed the rule.

Gypsum Carrier, Inc. v. Handelsman (C.A. 9, 1962) 307 F.2d 525;

Albina Engine & Mach. Wks. v. American Mail Line, Ltd. (C.A. 9, 1959) 263 F.2d 311.

## II

### The Findings Below Are the Court's Findings and Are Findings of Fact, Not Merely Conclusions.

Apparently recognizing the difficulties confronting any argument that the findings of the trial court in this case are clearly erroneous, appellant seeks to obtain a de novo review of the evidence by contending that the findings below are really not those of the trial judge and that, in any event, they are not findings of fact at all but merely conclusions (App. Br., Point I, pp. 8-10 and Point III, p. 27).

Appellant's charge that the trial judge did not exercise his "independent and unfettered judgment" is patently spurious and is an altogether unwarranted attack

upon the integrity of the trial judge. After the case was fully submitted and exhaustively briefed, the district court handed down its Memorandum Decision (R. 73-74), which detailed the specific charges of negligence found against the OTELLO and announced the court's finding that no fault had been established against the GRAND GRACE or the JANE STOVE. Thereafter, at the trial court's request, these holdings were incorporated into formal findings of fact by counsel and, upon submission to the court, were adopted in such form as the court's findings of fact.

Under these circumstances, it is clear that the findings entered were, in fact as well as in form, those of the court. Of great significance in demonstrating that the trial judge did exercise his independent judgment is the fact that several of the charges of negligence which the GRAND GRACE asserted against the OTELLO were rejected in the trial court's Memorandum Decision.

That the formal findings were prepared by counsel and thereafter adopted by the court in no way detracts from their force.

*Molitor* v. *American President Lines, Ltd.*
(C.A. 9, 1965) 343 F.2d 217, 219.

This court there commented:

> "It is immaterial that counsel for the prevailing party, at the request of the court, prepared the findings.
>
> "The only question concerning the facts of this case which this court may appropriately consider is whether any of the essential findings of fact are

clearly erroneous. McAllister v. United States, 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20."

In the case of

*Mississippi Valley Barge Line Co.* v. *Cooper Terminal Co.* (C.A. 7, 1954) 217 F.2d 321, 332-323

the court held that the "clearly erroneous" rule applied whether the court prepared its own findings or adopted those submitted by counsel. The following language from that decision is most apposite to the instant case:

> "The transcrpt of the evidence in this case shows that the trial judge took an active part in questioning witnesses when a fact in issue was not being properly brought out. It is perfectly clear to us from reading this record that the court was keenly aware of all the contentions made, and did come to its own definite conclusions at the end of the testimony. It was perfectly proper to ask counsel for the successful party to perform the task of drafting the findings and conclusions. If they had not reflected the court's own ideas as to what the findings should be they, of course, would not have been adopted."

As to appellant's argument that the findings of the trial court on the issues of negligence are reviewable de novo, suffice it to say that this is contrary to the established rule of this court.

*Molitor* v. *American President Lines, Ltd.* (C.A. 9, 1965) 343 F.2d 217, 219.

This court there stated:

> "* * * we hold that the implied finding of the

district court that there was no negligence or unseaworthiness in this regard is not clearly erroneous."

In the case of

*Gypsum Carrier, Inc.* v. *Handelsman*
(C.A. 9, 1962) 307 F.2d 525, 528

the district court had found that the libelant was not contributorily negligent. On appeal, this court rejected appellant's argument that this was a conclusion reviewable free from the "clearly erroneous" rule, commenting:

> "Thus we need not consider whether a trial court's conclusion as to the existence of negligence is generally to be classified as one of fact or of law. Clearly enough in the present case it reflected a factual determination from conflicting evidence. There is nothing to indicate, as appellant suggests, that the District Court tested appellee's conduct against an improper standard of care.
>
> If the District Court had agreed with the appellant's resolution of the problems of proof, it also would have concluded that appellee was guilty of contributory negligence. The District Court did not interpret the evidence as appellant does, and neither do we. On an examination of the whole record, we cannot say that the District Court's determination that appellant failed to carry its burden of proving contributory negligence was clearly erroneous."

*Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware* (C.A. 9, 1960) 276 F.2d 745, 752.

There the appellant contended, as does appellant here, that a determination that a party is or is not negligent is a conclusion of law and is therefore not protected by the "clearly erroneous" rule announced in

*McAllister*. This court rejected the appellant's contention, stating:

> "In the McAllister case the Supreme Court dealt specifically with a 'finding of fact' that the master of the ship was negligent. It was with respect to this finding that the court there held that 'no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.' *Since that decision this court has uniformly regarded determinations as to negligence made in admiralty cases as findings of fact which are not to be overturned unless clearly erroneous.*" (Emphasis supplied.)

Accord:

Albina Engine & Mach. Wks. v. American Mail Line, Ltd. (C.A. 9, 1959) 263 F.2d 311.
United States v. Harrison (C.A. 9, 1957) 245 F.2d 911.
United States v. The Agioi Victores (C.A. 9, 1955) 227 F.2d 571.

## III

## The Finding of No Fault on the Part of the JANE STOVE Is Supported by Substantial Evidence

The essence of appellant's charge against the JANE STOVE is that she proceeded recklessly through the anchorage area and directly across the OTELLO's bow, thereby preventing the latter from navigating ahead into the channel and forcing her to continue her drift on into collision with the GRAND GRACE. To establish this charge it was incumbent upon appellant to prove the following:

a. That the JANE STOVE was, in fact, proceeding in the anchorage area;

b. That the OTELLO actually entertained the intention to navigate north into the main ship channel;

c. That the JANE STOVE should reasonably have recognized and appreciated the OTELLO's plight and divined her intention to proceed north into the channel;

d. That the JANE STOVE'S course took her sufficiently close to the OTELLO to critically impede the latter's navigation; and

e. That had it not been for the movements of the JANE STOVE the OTELLO would have been able to extricate herself from her predicament.

An objective review of the record will demonstrate that *none* of the foregoing elements of appellant's claim against the JANE STOVE were established by satisfactory evidence. On the contrary, not only is there some substantial evidence to support the trial court's finding that the JANE STOVE was free from fault, but the great weight of the credible evidence requires such finding.

The testimony of Pilot Quinn, who was at the conn of the JANE STOVE, is sufficient alone to exonerate the JANE STOVE from fault. As a Columbia River Bar Pilot of many years experience, he was the one navigator involved in this matter who was intimately familiar with the waters in question. Moreover, his testimony was given personally in court at trial and the trial judge was able to observe his attitude and demeanor while testifying.

Captain Quinn's testimony establishes that the JANE STOVE, after her attempt to anchor near the Coast Guard Station proved unsuccessful, proceeded upstream toward Tongue Point and there turned in the vicinity of Buoy No. 43 and headed down the main ship channel on the Astoria Range (R. 287-288). After attempting to anchor in the channel directly behind the ANTINOUS (R. 289), and when her anchor again failed to hold, the JANE STOVE heaved in her anchor and resumed her course down the channel on the Astoria Range (R. 290).

As the JANE STOVE so proceeded, Captain Quinn had the ship under complete control and had the other three vessels in the vicinity --- the ANTINOUS, the OTELLO and the GRAND GRACE—under observation (R. 291). There was nothing to indicate to Captain Quinn that the OTELLO was having a problem that required any action on the part of the JANE STOVE. Although Captain Quinn did observe that the OTELLO was laying across the wind (R. 292), his observation of her disclosed simply a vessel at anchor in the anchorage, with nothing to indicate that she was maneuvering or that she entertained any intention of proceeding on a course which might conflict with that of the JANE STOVE (R. 292). Because of the position of the OTELLO, Captain Quinn did elect to pass the ANTINOUS on the leeward side as closely as possible, which he did (R. 293). As the JANE STOVE approached the ANTINOUS Captain Quinn heard no whistles froom the OTELLO (R. 295) or observed any other signal or indication from her that she wished the JANE STOVE to stop (R. 296) and, when the JANE STOVE passed by the OTELLO

there was still no indication of immediate danger of collision between the OTELLO and the GRAND GRACE. In any event, the JANE STOVE passed the OTELLO at a distance of 900 feet (R. 300) and accordingly was never sufficiently close to impede the OTELLO's navigation as appellant claims.

Captain Quinn testified that, under the circumstances presented, his most prudent course was to pass the ANTINOUS on the leeward side as closely as possible. He explained that although it would have been possible for him to have stopped the JANE STOVE in the channel or to have passed the ANTINOUS on the north, if necessary, these movements would have been hazardous because stopping would very probably have resulted in losing headway and control of his ship (R. 297) and passing to the north would have required him to leave the channel and go into an area where uncharted shoals frequently exist (R. 298, 314-316). These alternatives are entirely hypothetical, however, as, for the reasons set out above, there was nothing which reasonably indicated to Captain Quinn that such movements were necessary.

Captain Quinn's testimony that the JANE STOVE was in the channel and on the Astoria Range is supported by Captain Pullen, Master of the ANTINOUS (R. 1629) and by Ralph Regh, Second Mate of the TEXICO CALIFORNIA, another disinterested witness (R. 1919). Even the testimony of Captain Sundlof, the OTELLO's Master, indicates that the JANE STOVE was in the channel as she came downstream toward the ANTINOUS.

"Q. How did the JANE STOVE appear to be heading with relation to your vessel at that time?

A. When I first saw her a mile away, or something like that, then she seemed to me to be heading against the ANTINOUS.

Q. Did she ever seem to change that heading?

A. No.

Q. What do you mean when you say heading against the ANTINOUS?

A. Well, the ANTINOUS was—it was almost the same course or the same line as the ANTINOUS." (R. 182).

In view of the fixed position of the ANTINOUS at or a little bit north of the Astoria Range Line in the channel, the foregoing observation of Captain Sundlof necessarily puts the JANE STOVE in the channel.

Appellant endeavors to make much of the fact that the JANE STOVE'S Master, in his deposition, placed the JANE STOVE'S course somewhat to the south of the channel. This is not a significant discrepancy and, at most, simply posed for the trial judge the question of whether the Master or pilot was the more likely to be accurate. In view of Captain Quinn's intimate familiarity with these waters and the navigational aids there situated, as opposed to the Master's admitted uncertainty as to whether the ship was or was not in the channel, this was not a difficult question to resolve. Certainly, any such differences in observations do not "refute" or in any way discredit Captain Quinn's testimony, or justify the charge made by appellant that the trial judge violated his duty by failing to read depositions or, if he read them, that he ignored them.

Appellant has constructed an elaborate explanation of events tending to create the impression that the OTELLO, through no fault of her own, became trapped in a position of peril and that the only avenue to safety was for her to proceed north into the ship channel. However, an observation of the most credible evidence—that which is undisputed and that which comes from disinterested witnesses—casts serious doubt upon this version of the events. To begin with, it is apparent that the OTELLO actually made no effort to maneuver, at least until the collision with the GRAND GRACE was immediately imminent. Captain Pullen of the ANTINOUS, who perhaps had the best vantage point of all from which to observe events, stated categorically that from the time the OTELLO commenced dragging anchor she made no observable attempts to maneuver:

> "A. Well, looked like to me she was just paralyzed, or whatever it was, because she just kept drifting, drifting down. I know what I would have done if I was in her place, but I wasn't there so I will not say. . . . Well, I just saw her drifting down broadside and she was not able to heave in her port anchor and she didn't drop the starboard one, and she was just drifting down like a piece of wood. That is the only thing I can describe." (R. 1620)
>
> . . . . .
>
> "A. Well, *this one wasn't even navigating,* she was just drifting like a log, she was drifting from that time right down until she hit the GRAND GRACE in one straight line. She didn't drift this way, *she didn't do any maneuvering at all,* she just drifted, period." (Emphasis supplied) (R. 1693).
>
> . . . . .

"A. What is she doing about it, that is my answer. There she is drifting down like a piece of log. What has she done?" (R. 1695).

Chief Mate Boese of the ANTINOUS gave similar testimony:

"Q. And as you observed her did it appear that the Swedish ship was making any effort to get underway or to alter the drifting that she was making down toward the Chinese ship?

A. I didn't notice. She seemed like she drifted in a straight line to me.

Q. I take it then your answer is, as far as you could tell it did not appear that she made any effort to get underway or to do anything else to—

A. Or drop another anchor or anything.

Q. She did not?

A. She did not." (R. 1714, 1715).

It will also be remembered that all during this time the OTELLO still had her port anchor out, which throws additional doubt on her claimed intention to navigate out into the channel. Moreover, the OTELLO's bell book (Ex. 10B) contains no entries which reflect any such intended maneuver. This question is quite pertinent—if the intention to head out of the anchorage into the channel in fact existed, why were such maneuvers not undertaken much earlier? The OTELLO, equipped with twin diesel engines, was a highly maneuverable ship. Nothing in the record explains why she did not attempt to maneuver to the west or to the south, either of which directions presented clear water. Or if the movement to the north into the ship channel was considered the most desirable maneuver, it certainly could and would have been

made earlier. The JANE STOVE was not yet in the vicinity and the ANTINOUS, which was at least two-tenths of a mile away, could have been easily avoided. All these factors strongly suggest that the claimed intention to navigate northerly into the channel was conceived at much too late a time ever to have been acted upon under any circumstances.

Additionally, the record is entirely devoid of evidence which would in any way establish that those aboard the JANE STOVE were aware or should have been aware of this undisclosed intention of Captain Sundlof to move his anchored vessel into the channel.

Appellant makes much of the whistle signals which Captain Sundlof states were given by the OTELLO prior to the collision. It appears from the testimony of some disinterested witness that some whistle signals did emanate from the OTELLO prior to the collision. However, there is a hopeless conflict in the testimony as to whether these whistles were pilot signals, warning signals, when such whistles commenced to be blown, how frequently they were blown, for what purpose they were blown and when they ceased. Under any theory of the evidence, any such whistles were ambiguous and, even if heard, were inadequate to convey the information which the OTELLO now contends was or should have been conveyed thereby. In fact, even Captain Sundlof was unable to say with any certainty what he expected the JANE STOVE to do upon hearing his whistle signals, other than that he expected the JANE STOVE to give him "permission" to cross in front of the JANE STOVE (R. 228).

Many of the disinterested witnesses in the area, some of whom were closer to the OTELLO than the JANE STOVE, heard no whistle signals whatever. Captain Quinn testified that he heard no whistle signals from the OTELLO. In this, he was supported by the other personnel aboard the JANE STOVE. Upon this state of the record, appellant can claim nothing by reason of the testimony of the OTELLO personnel regarding the giving of whistle signals.

There is no other evidence in the record which would have placed a reasonably prudent navigator in Captain Quinn's position upon notice that any unusual action on his part was required. Insofar as Captain Quinn was aware, he was maneuvering his vessel properly down the channel, had the anchored vessels under close observation and saw nothing which would reasonably apprise him that the OTELLO had gotten herself so entrapped that her captain had concluded that the only avenue of escape was to proceed northerly into the path of the JANE STOVE. There is nowhere any evidence that Captain Quinn had reason to know that the OTELLO intended to get underway and head north. Based upon the facts available to him, Captain Quinn made a judgment decision, which was that the safest course for his vessel and the other vessels around him was to proceed as closely as possible past the ANTINOUS on the latter's leeward side and thus remove his vessel from the area. Captain Quinn obviously was not chargeable with knowledge at the time that the OTELLO would not drop her other anchor and thus stop her drift,

or that she would not maneuver to the west or to the south, or of Captain Sundlof's undisclosed decision, if it existed, to move his vessel in a northerly direction into the channel. In fact, it is extremely significant here that there is no testimony from any of the OTELLO personnel, including Captain Sundlof, to the effect that the OTELLO could *not* have been maneuvered to the west or to the south.

Captain Quinn's experience and qualifications as a mariner are of the highest caliber, he is thoroughly familiar with the waters in question, and his conduct must be judged, not by the hindsight of ingenious proctors, but in the light of the circumstances as they existed at the time. The trial court correctly found that, under these circumstances, Captain Quinn's judgment decision was not one which can be said to have created an undue risk of danger to the other involved vessel or one which would not have been made by a reasonably prudent navigator.

Moreover, regardless of the determination which is made concerning the propriety of Captain Quinn's judgment decision in connection with his maneuvering of the JANE STOVE, the credible evidence fails altogether to support the appellant's contention that any action of the JANE STOVE effectively prevented the OTELLO from maneuvering away from collision with the GRAND GRACE. Admittedly, the testimony of how close the OTELLO and the JANE STOVE came to each other varies from about twenty-five yards to approximately four hundred yards. Perhaps the most credible testimony on

this point is that of the disinterested Captain Pullen of the ANTINOUS, who was not only the closest uninvolved witness, but who also observed the ships on his radar. He placed the OTELLO and the JANE STOVE about two hundred, possibly three hundred, yards apart (R. 1615, 1616). Additionally, Captain Pullen stated that the JANE STOVE passed within seventy-five yards of the ANTINOUS (R. 1615, 1682). Captain Sundlof's testimony confirms this (R. 43). Captain Pullen put the radar distance between the ANTINOUS and the OTELLO at not less than two-tenths of a mile, or four hundred yards. Based upon these observations, the distance between the JANE STOVE and the OTELLO was something in excess of three hundred yards, or nine hundred feet.

Accordingly, it is seen that another essential part of appellant's case against the JANE STOVE—that the JANE STOVE passed so closely as to force the OTELLO to stop her forward maneuvers—has not been made out. In any event, the evidence at this point is more than sufficient to support the trial court's finding.

Inasmuch as appellee Lorentzens Skibs A/S is not directly concerned with the charges of negligence against the OTELLO, no review of the evidence in this particular regard will be undertaken in this brief. However, appellee Lorentzens Skibs A/S does express its concurrence with the position of co-appellee, Grace Navigation Corporation, which undoubtedly will present in its brief a detailed discussion of the OTELLO's fault. It is sufficient for appellee Lorentzens Skibs A/S to state that

the evidence below amply supports the trial court's finding No. 22:

> "The faults and negligence of the MS OTELLO and those in charge of her navigation were flagrant and major in character and were the proximate cause of and fully account for the collision, and if there were any doubts as to the conduct of the respondents or either of them, such doubts would be resolved in their favor." (R. 80).

## IV

### Litigation Expenses

The trial court, exercising its proper discretion, allowed this appellee's claim for litigation expenses in the amount of $2,409.89. Such expenses were, in the main, incurred in connection with pretrial depositions. The court's action in allowing this claim is authorized by *Vaughan* v. *Atkinson* (1962) 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 88.

## CONCLUSION

The trial court found, and stated in the clearest of terms, that appellant's suit below was meritless. The record fully supports the trial court's determination and, for the reasons set forth hereinabove, the decree of the district court in favor of the JANE STOVE and her owners should be affirmed, with damages for delay, pursuant to Rule 24 of this court.

Respectfully submitted,

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MV JANE STOVE and
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## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

CURTIS W. CUTSFORTH
Of Proctors for Appellees